
(2021) 04 NCLT CK 0019

In the National Company Law Appellate Tribunal

Case No : Interlocutory Appeal No. 5487 Of 2020 In Company Petition (IB) No. 2375/(ND) Of 2019

Latit Mohan Agarwal

APPELLANT

Vs

Francis Remedies (India) Private Limited And Ors.

RESPONDENT

Date of Decision : 13-04-2021

Acts Referred:

Insolvency And Bankruptcy Code, 2016 — Section 25(2)(h), 60(5)
Insolvency And Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016 — Regulation 36A, 36A(1)

Citation : (2021) 04 NCLT CK 0019

Hon'ble Judges : P.S.N. Prasad, J;Dr. V.K. Subburaj, Member (Technical)

Bench : Division Bench

Judgement

1. This is an application filed by the Applicant under Section 60(5) of the IBC, 2016 seeking urgent directions of this Tribunal to direct the Respondent (RP) to allow the participation of the Applicant to introduce the Resolution Plan in the CIRP process of the Corporate Debtor in terms of its email dated 02.12.2020 so that the same may be considered by the CoC of the Corporate Debtor. The Applicant has contented as follows:-

i. That it is submitted that the applicant is interested in submitting the resolution plan for the Corporate Debtor as the past experiences, passion and unique approach of doing the work makes the applicant most suitable applicant for running the Corporate Debtor as a going concern and also the applicant has a good credibility and image in the market. It is further submitted that due to spread of COVID pandemic the applicant and his family got suffered from COVID and because of which the movement of the applicant and his family got restricted and because of this reason he could not be able to submit the EOI at that time.

ii. That it is pertinent to mention that the resolution professional vide Form G dated 21.09.2019 had issued advertisement for submission of Expression of interest for invitation of resolution plan according to which the last date for

receipt of EOI was 06.10.2020.

iii. That thereafter the applicant had vide email dated 02.12.2020 had submitted his interest along with the copy of DD of Rs. 50,00,000 and also the net worth certificate which shows the net worth of the applicant as Rs. 45 crores.

iv. That after submission of documents, the applicant was of the view that it will be presented in the next COC and COC will consider the same but in the meantime before any COC meeting the applicant had received an email dated 03.12.2020 from the resolution professional wherein he had refused to accept the EOI of the applicant and had mentioned that it is received much later.

v. That after receipt of that email the applicant got shocked to see the behavior of the resolution professional as the resolution professional at the time of verbal communication had never denied to the applicant and now they had refused to accept the same. It is most pertinent to mention that to the best of the knowledge of the applicant after receipt of email of the applicant and after seeing the amount of DD as submitted by the applicant, the resolution professional had negotiated and renegotiated with the existing resolution applicant and also the main leading member of COC consisting of Canara Bank is only interested in getting their amount back and they are not interested in running the Corporate Debtor as a going concern.

vi. That it is submitted that as per the information of the Applicant only one resolution plan has been received by the resolution professional and that too by the joint applicant. It is pertinent to mention that the net worth of the applicant (who- is an individual) is Rs 45 crores which is much higher than the net worth of the joint applicant who filed the resolution plan and to the best of our knowledge none of the Company is having any object relating to Pharma industry and also the resolution plan submitted by the resolution applicant has not been approved by the members of the COC till date.

vii. That it is submitted that the after exclusion of time period only 170 days of the Corporate Insolvency Resolution Process of Corporate Debtor. Therefore it is clearly evident from the above that there is much time left for submission of a better resolution plan and also the object of the code is to revive and reorganization of a company and also the resolution plan of another competitor would advance the object of the code in maximization of the assets of the Corporate Debtor and the same view was also opined by the Hon'ble Principal Bench while deciding the matter of Punjab National Bank Vs Bhushan Power & Steel Limited in CIA. No. 152(PB)/2018 in C.P. (TB)- 202(PB)/2017 dated 23.04.2018.

viii. That the objective of the code is the value maximization and revival of the Corporate Debtor as a going concern and in absence of an opportunity of submitting the resolution plan being granted to us the true objective of the code cannot be achieved.

ix. That the Applicant submits that it may be allowed to present its resolution plan in terms of the Form G. In case, it is allowed to present the resolution plan, it will give the most advantageous position to all the 13 creditors of the CD. The plan of the Applicant would be higher than the plan already submitted by another resolution applicant. It will maximize the wealth of all the creditors of CD.

2. After hearing the counsels of both the Applicant and the Resolution Professional, this Tribunal vide its orders dated 17.12.2020 directed the Resolution Professional to place the proposal of the Applicant before the CoC for its consideration keeping in mind the principle of maximizing the value of the assets of Corporate Debtor company. The Tribunal also ordered the Applicant to pay the double amount of the EMD to prove his bonafide intentions.

3. The Respondent viz, the Resolution Professional has filed its reply to the contentions made by the Applicant in which the following submission are made:-

i. That the undersigned as per regulations 36 A (1) of the Insolvency and Bankruptcy (Insolvency Resolution for Corporate Persons), Regulations 2016 has published Form G for invitation for expression of Interest, wherein the last date of the receipt of expression of interest was fixed at 06.10.2020 and last date for submission of Resolution plan was 16.11.2020 before 6 pm.

ii. That the Applicant herein has sent an email to the undersigned RP on 02.12.2020 for considering his proposal which was delayed by 57 days.

iii. It is surprising how the Applicant herein knows all the criteria for filling of EOI which was not mentioned in Form -G moreover this information was available only on email as per the clause no 8 of Form-G as per section 25(2)(h) and Petitioner never contacted for obtaining such information from the Resolution Professional.

iv. It is pertinent to mention here that claimed more experience and net worth as compared to earlier RA without knowing the facts of the resolution applicant meaning thereby that Applicant was ill informed about the form-G and detailed procedure to be followed in a CIRP proceedings which follow a strict time line as per law.

v. Moreover, the Applicant has claimed that he could not submit the expression of interest on time due to restriction of movement due to the spread of pandemic was absolutely false and baseless as the applicant the said period.

vi. It is noteworthy that the Applicant was moving freely during the period for submission of EOI which can be observed from the posting made by the Applicant in social sites which proves that the applicant did not approached this Tribunal with clean hand hence, his application shall be rejected on this ground only.

vii. However, as per the directions of this Hon'ble Tribunal vide order dated 17.12.2020 to submit a detail proposal to the undersigned to enable him place

the same before the COC for consideration and posted the matter for 05.01.2021.

viii. It is most respectfully submitted that the undersigned RP has demanded some documents / clarifications from the Applicant to evaluate his technical bid and this Tribunal was also pleased to direct the applicant to provide the same vide order dated 05.01.2021.

ix. That the applicant has provided some documents on the request of RP, however all the documents as desired by the RP was not provided by the Applicant after various email communications and on the basis of all such available documents, the undersigned RP evaluated as per law and duly placed resolution plan before the 09th COC held on 16.01.2021.

x. That the applicant had relied on a SBI bank letter which ensures that the bank will provide a financial assistance amounting to Rs.15 crores and above. The Resolution professional had tried to verify through various modes even after the CoC members clearly denied to consider such unconditional letter of Financial Assistance.

xi. The Resolution Professional had approached the Bank Manager via e-mail and they have not replied to the e-mail sent by RP. However, the RP personally visited the Bank Branch on 5th January 2021 to verify the same. But the said official Mr. Mohd. Azam, Chief Manager refused to verify the contents of the certificate issued to prospective resolution applicant and blatantly refused to cooperate with the RP in regard to the letter dated 22.12.2020.

xii. That thereafter the undersigned RP sent another letter to the DGM, Circle Network -2, State Bank of India, Parliament Street, New Delhi -110001 i.e. the concerned circle office of the bank wherein no reply has been received by the RP till date. Therefore, the RP is unable to verify his liquidity and source of funds.

xiii. That the undersigned herein submits that the Applicant has provided a Net Worth Certificate amounting to Rs.45.13 crores issued by Aayush Gupta and Associates, Chartered Accountant, Roorkee dated 14.11.2020.

xiv. That the RFRP approved by the CoC authorised the RP to verify the net worth documents supported by certificate issued by a statutory Auditor and not just a certificate issued by CA. without providing any supporting document. Therefore, such certificate is not credible enough to be considered along with the Technical bid.

xv. That it is further submitted the undersigned RP has also sent an email to CA Aayush Gupta & Associates on 28.12.2020 who has issued net worth certificate dated 14.11.2020 to the applicant for providing the various documents which have been provided to him for issuing a Net worth Certificate of Rs.45 Crores.

xvi. It is pertinent to mention here that the said CA replied to email dated 28.12.2020 and the same is reproduced hereunder: - "Dear Sir, Due to last dates of TAX AUDIT and GST AUDIT we are unable to provide requisite documents on

urgent basis. As soon as we complete our audit compliances, we provide all requisite documents to your good self'. However till date he did not produce any documents to substantiate his opinion.

xvii. That since the Applicant failed to provide satisfactory documents / clarifications as required by the RP to evaluate applicants proposal as per regulation 36 A of IBBI CIRP Regulation, 2016, hence it proves that the present application is filed just to delay the process of CIRP only and the same shall be dismissed with exemplary cost and warnings.

xviii. That The CoC members agreed to the Resolution professionals findings and were of the view that such applicant is resurrecting hindrances in the proceedings of the CIRP, wherein The RP and the CoC has made all efforts to fulfill the intent of the code and have followed all such directions made by the Hon'ble NCLT in the interest of justice and to maximize the interest of the corporate debtor. The CoC members suggested that only the resolution for rejection of the proposal of the Resolution applicant shall be put up for physical voting. Without further ado, the CoC members resolved to take decision on the submitted Resolution Plan by the preexisting Resolution Applicant in the next CoC meeting.

xix. That it is further submitted that the CoC has resolved and voted in favour of the rejections of the proposal submitted the present applicant with 100% voting.

xx. That it is further submitted that the CoC was appraised various judgment of Hon'ble Apex Court and the Hon'ble NCLAT which has held that in the matter of Kalinga Allied Industries India Pvt. Ltd. Vs Hindustan Coils Ltd. In Company Appeal (AT) (Insolvency) No. 518 of 2020 "With the aforesaid, we are of the view that when the Application for approval of Resolution Plan is pending before the Adjudicating Authority at that time the Adjudicating Authority cannot entertain an Application of a person who has not participated in CIRP even when such person is ready to pay more amount in comparison to the successful Resolution Applicant. If a Resolution Plan is considered beyond the time limit then it will make a never-ending process.

4. We heard the arguments and the parties were directed to submit the written submissions on the contents of their arguments. Accordingly the Applicant has submitted the Written Submissions in which the following points were raised by the Applicant:-

i. That the applicant had earlier approached the Hon'ble NCLT, New Delhi Bench. for seeking directions from the bench for allowing him to file his resolution plan before the Resolution Professional of the Corporate ? Debtor in the CIRP. That vide order dated 17.12.2020, the Hon'ble Tribunal had allowed the applicant to submit his resolution plan, subject to the payment of double amount of the EMD to show its bonafide which was duly submitted by the applicant within the time period allowed by the Hon'ble NCLT, thereafter RP had, instead, of adhering to the Order of Hon'ble Bench tried his level best to knock down the applicant by

every possible means which fact can also be inferred from the following chronologically mentioned facts:

a) Resolution Professional had tried to supersede the Hon'ble Bench and in gross violation of the order of Hon'ble Tribunal dated 17.12.2020 no placed the plan before the COC and instead chosen to smartly record the descent of COC by mentioning that "RESOLVED, The Committee of Creditors be and is hereby Rejects the proposal submitted by Resolution Applicant which is put before the RP due to various non-compliance of documents sought by the RP to evaluate his technical bid as mentionied in details herein above".

Which clearly shows that neither the plan has been placed before the COC and nor the COC had taken any informed decision.

b) Furthermore, the Resolution Professional is clearly acting in collusion of erstwhile Resolution Applicant which facts can be substantiated .with the facts that on the one side the Resolution Professional is continuously supporting them in every hearing by even jointly arguing against the applicant before your lordship and at NCLAT too and on the other hand he is trying his level best to find the faults in the documents submitted by the applicant even at the cost of law and contempt of order of this Hon'ble bench.

c) Secondly, Resolution Professional in gross violation of provisions of Code had threatened and inquired with the Auditor of the applicant who had given the Net worth.' certificate and the Chief Manager of State Bank of India Roorkee who had given the letter of comfort in favor of the applicant by impersonating himself as an officer of the court. Even the Resolution Professional literally went to the extent of threatening them of being prosecuted for contempt of court.

d) Thirdly; he had tried to challenge the judicial decision of Hon'ble NCLT and had attempted to prejudice the mind of Hon'ble Bench by placing some social media photographs prior to the Order of Hon'ble NCLT and had not brought the fact that the applicant had approached the Resolution Professional and the COC members prior to the filing of this application and showed his interest in submission of plan. to which the Resolution Professional had asked the applicant to submit EMD of Rs. 50 Lakhs along with the net worth certificate of the applicant, which applicant had submitted via email dated 02.12.2020 and thereafter the RP had refused to accept the same and, in his arguments, he had used his very own act against the applicant by mentioning that applicant is playing with insider information.

All the above clearly depict the malafide and Consensus Ad Idem amongst the erstwhile Resolution Applicant and the Resolution Professional whereas the Resolution Professional had in every possible ay trying to create a smooth ride for the erstwhile Resolution Applicant to sail through his resolution plan for the reasons best known to him.

e) That, lastly the Applicant humbly submits before your lordship that the

Resolution Plans including the financial bid of both the resolution applicants be called up for consideration of this Hon'ble Bench before disposal of this application and then your lordship may order in the best interest of justice and in the best interest of stakeholders. Which is also in consonance of the objective of the Code i.e. "Value Maximization", moreover it's the apprehension of the Applicant that Resolution Professional in collusion of Resolution Applicant is trying to dispose of the assets of the Corporate Debtor at much lesser price which can even be less than the Liquidation value which fact can only be verified by your lordship on consideration of both the Resolution Plans. It is further submitted that if permitted, the applicant is ready to submit his Resolution Plan in a sealed cover envelope before the Hon'ble Bench.

5. Hearing the arguments made by both the parties and perusal of the documents submitted by them reveal that the CoC has not considered the proposal submitted by the Applicant in toto but has rejected the resolution plan of the Applicant on technical grounds. The apprehension of the Applicant is that the RP is supporting the plan of the single Resolution Plan received earlier and has taken all steps to see that the overall plan was not seen by the CoC. The idea of giving an opportunity to the Applicant to submit his plan by paying the double amount of EMD is to maximize the value of the assets of the Corporate Debtor company as per the intentions of the IBC, 2016. Obviously this has not happened.

Keeping the above scenario in mind this Tribunal disposes of this application with directions to the RP to place the overall Resolution Plan of the Applicant before the CoC once again for its informed decision on this issue keeping in view the objectives of the IBC, 2016.